

1 Respondent opposes the petition (Oppo. p. 3), arguing there was no Brown Act violation
2 because the discussion of the current state of the Draft Housing Element amendment was
3 informational only, the Board of Supervisors took no vote or “action” on the matters discussed,
4 and the time spent on this matter falls within an exception to § 54954.2 which Respondent
5 construes to permit a “brief report” on off-agenda items. (Oppo. p. 3)

6 Respondent also argues that mandate relief is not available because the Board of
7 Supervisors has the discretionary power to determine whether a report is sufficiently “brief” to
8 fall within the exception. (Opposition. p. 4-5)

9 Finally, Respondent contends the cause of action for declaratory relief fails because there
10 is no “justiciable controversy.” (Opposition. p. 4)

11 Respondent does not dispute the events as described by Petitioner and the only question
12 is the legality of the Board of Supervisors’ actions.

13 As discussed below, the court finds in favor of Petitioner and concludes that the Board of
14 Supervisors violated the Brown Act by not listing this report as an agenda item, and that no
15 statutory exceptions apply.

16 FACTS

17
18 On August 12, 2014 Petitioner sent a letter to the Board of Supervisors raising questions
19 concerning the County’s methodology and conclusions contained in the draft Housing Element,
20 and requesting that County delay submitting the Draft Housing Element to the State Department
21 of Housing and Community Development in order to give the public more time to review the
22 draft document and comment on it, and to schedule a public hearing for further participation.
(Ex. A)

23 The Agenda prepared for the next scheduled hearing of the Board of Supervisors set for
24 August 19, 2014 did not contain notice of any item dealing with the Draft Housing Element.
25 (Ex. B)

1 Ironically, in a few places of the posted Agenda it was noted: “While members of the
2 public are welcome to address the Board, under the Brown Act, Board members may not
3 deliberate or take action on items not on the agenda, and, generally, [Board members] may only
4 listen.” (Ex. B, pp. 1, 7.)

5 The minutes of the Board of Supervisors prepared after the August 19 meeting note that
6 during Agenda Item No. 2 – “Board of Supervisors’ Matters”, the Draft Housing Element was
7 discussed, and specifically: “Supervisors Rice and Arnold commented briefly regarding
8 correspondence from community members related to the Draft Housing Element.” (Ex. C)

9 During the time for Agenda Item No. 3 – the “Administrator’s Report,” the minutes noted
10 that Community Development Agency Director Brian Crawford, “provided an update on the
11 status of the Draft Housing Element” and both Director Crawford and Principal Planner Ms.
12 Leelee Thomas “responded to questions from Board members regarding various components of
13 the Draft Housing Element.” (Ex. C)

14 As more fully demonstrated in the video-recording of the meeting, Supervisor Rice
15 initiated the discussion over the Draft Housing Element by stating that during the past weeks the
16 Board had been receiving emails on the Draft Housing Element, and she recognized many of the
17 “redshirts” in the audience who have spoken out at past forums against the Draft Housing
18 Element. Supervisor Rice remarked it was good for the decision-making process to see the
19 public is involved and she briefly read from prepared notes touching on the nature and purpose
20 of the state-mandated Housing Element that the County must prepare every 8 years.

21 Supervisor Rice indicated that later in the meeting Brian Crawford, the Director of the
22 Community Development Agency, will speak on the progress and process of preparing the
23 updated Housing Element for the upcoming 2015-2023 planning period. She ended these
24 comments by stating she welcomed input from the public and that there is lots of time left for
25 public discussion of the Housing Element. These remarks consumed about 3 minutes’ time.

 Supervisor Arnold followed and immediately remarked on the many letters in opposition
to the Draft Housing Element received on this issue, including the letter from Petitioner
Community Ventures Partners. She then read a letter from a constituent who disagreed with the
Draft Housing Element opponents and who voiced support for the County’s efforts to provide

1 more housing as described in the Draft Housing Element. Her comments lasted about 2 ½
2 minutes.

3 Next, Director Crawford, whom Supervisor Rice asked to be present at the meeting, gave
4 about a 10 minute prepared report describing: the current status of the Draft Housing Element;
5 the benefits to the County of meeting certain statutory timelines; the procedures leading to initial
6 review by the State and the ultimate adoption of the Housing Element by the Planning
7 Commission and the Board of Supervisors; the Board's options in changing the housing sites
8 lists after initial approval by the State; noting a discussion was held between himself and the
9 County Counsel on a legal issue connected to the approval of the Housing Element by the
10 statutory deadline; and the fact that several prior public meetings and information workshops
11 about the Draft Housing Element have been held. Director Crawford's report also responded to
12 some of the issues raised in Petitioner's August 12th letter.

13 This report was followed by four minutes of Q and A between members of the Board of
14 Supervisors, Mr. Crawford and the County's Principal Planner Ms. LeeLee Thomas involving
15 specific components of the Draft Housing Element which were currently under review by the
16 Planning Commission, e.g., housing density ratios and buffers. The total time spent by Mr.
17 Crawford and Ms. Thomas at the meeting, including the above report, was about 15 minutes.

18 During "Open Time" several "redshirt" residents asked the Board for more time to
19 review and comment on the Draft Housing Element. These same people spoke out against the
20 draft Housing Element, especially the proposed number of affordable housing units, their
21 location and density ratios. In fact, one opponent also noted that prior to this meeting she sent a
22 letter request to the Board asking to "agendize" the Housing Element for this meeting, which
23 request was obviously ignored.

24 At the end of the public testimony, Supervisor Arnold made some very brief remarks
25 clarifying some points made by the Housing Element opponents.

It is uncontroverted that had the County notified Petitioner that the Draft Housing
Element was going to be discussed, it would have sent a representative to attend the hearing.
(Ex. E)

1 On September 18, 2014 Petitioner sent the County a “cease and desist” letter requesting
2 the County not to repeat the purported Brown Act violations, which letter is required by Govt.
3 Code § 549460.2(a)(1) as pre-condition to filing this action,. (Ex. E) The County did not
4 respond to Petitioner nor did it admit that it had erred or that it would not commit similar
5 violations in the future. To the contrary, County Counsel refused to acknowledge that any
6 illegality occurred. (Ex. F)

7 1.
8 The Brown Act

9 “The Brown Act (§ 54950 et seq.) provides for open meetings for local legislative bodies
10 such as city councils, boards of supervisors and school boards. [Citation.]” (*Ingram v. Flippo*
11 (1999) 74 Cal.App.4th 1280, 1287.)

12 Adopted in 1953 and since amended, the Brown Act “is intended to ensure the public’s
13 right to attend the meetings of public agencies. [Citation.] To achieve this aim, the Act requires,
14 inter alia, that an agenda be posted at least 72 hours before a regular meeting and forbids action
15 on any item not on that agenda. (Gov. Code, § 54954.2, subd. (a).) The Act thus serves to
16 facilitate public participation in all phases of local government decisionmaking and to curb
17 misuse of the democratic process by secret legislation by public bodies. [Citation.]” (*Golightly*
18 *v. Molina* (2014) 229 Cal.App.4th 1501, 1511, *internal citations omitted*; accord. *San Joaquin*
19 *Raptor Rescue Center v. County of Merced* (2013) 216 Cal.App.4th 1167, 1176.)

20 The agenda rule of the statute unambiguously requires that the Board of Supervisors
21 “shall post an agenda containing a brief general description of each item of business to be
22 transacted or discussed at the meeting, . . .” (§ 54954.2(a)(1), *emphasis added*.)

23 However, § 54954.2 (a) provides several exceptions which permit the discussion of non-
24 noticed items under limited circumstances:

25 (2) No action or discussion shall be undertaken on any item not appearing on the
posted agenda, except that members of a legislative body or its staff may briefly
respond to statements made or questions posed by persons exercising their public
testimony rights under Section 54954.3. In addition, on their own initiative or in
response to questions posed by the public, a member of a legislative body or its
staff may ask a question for clarification, make a brief announcement, or make a
brief report on his or her own activities. (Emphasis added.)

1
2 When an agency fails to comply with the Brown Act, Govt. Code § 59460(a) permits an
3 interested person to sue to enforce its provisions. The statute provides in part:

4 The district attorney or any interested person may commence an action by
5 mandamus, injunction, or declaratory relief for the purpose of stopping or
6 preventing violations or threatened violations of this chapter by members of the
7 legislative body of a local agency or to determine the applicability of this chapter
8 to ongoing actions or threatened future actions of the legislative body, or to
9 determine the applicability of this chapter to past actions of the legislative body,
10 subject to Section 54960.2. (Emphasis added.)

11 “A writ of mandate may be issued by any court to any inferior tribunal, corporation,
12 board, or person, to compel the performance of an act which the law specially enjoins, as a duty
13 resulting from an office, trust, or station...” (Code Civ. Proc., § 1085, subd. (a).) “[M]andamus
14 will not lie to control an exercise of discretion, i.e., to compel an official to exercise discretion in
15 a particular manner. [Citation.] Generally, mandamus may only be employed to compel the
16 performance of a duty that is *purely ministerial* in character.” (*Morris v. Harper* (2001) 94
17 Cal.App.4th 52, 62 italics added.) . . . We examine the entire statutory scheme to determine
18 whether the [entity] must exercise significant discretion to perform a duty.” (*Sonoma Ag Art v.*
19 *Department of Food and Agriculture* (2004) 125 Cal.App.4th 122, 127, 22 Cal.Rptr.3d 468.)”
20 (*Mooney v. Garcia* (2012) 207 Cal.App.4th 229, 232-33.)

21 “Whether [a statute] impose[s] a ministerial duty, for which mandamus will lie, or a
22 mere obligation to perform a discretionary function is a question of statutory interpretation.”
23 [Citation.]” (*Mooney v. Garcia* (2012) 207 Cal.App.4th 229, 233.)

24 The Brown Act is a remedial statute and as such, “it should be construed liberally in
25 favor of openness so as to accomplish its purpose and suppress the mischief at which it is
26 directed. [Citations.]” (*Golightly v. Molina, supra*, 229 Cal.App.4th at p. 1512.)

2. Writ of Mandate

27 The undisputed evidence shows that the Board was well aware of the public’s continuing
28 interest in the status and content of the Draft Housing Element, based on numerous letters to the

1 Board of Supervisors and the vocal opposition received at previously held public hearings and
2 information sessions throughout the County. Also, Director Crawford's appearance at the
3 meeting was specifically planned by Supervisor Rice in response to numerous letters the Board
4 had received during the weeks before the meeting, including Petitioner's letter.

5 Construing the statute to give the fullest effect to its purpose – e.g., to ensure the public's
6 right to be informed of the transactions and discussions undertaken by their elected officials, and
7 to attend open meetings of the Board of Supervisors, the court concludes that notice of Director
8 Crawford's planned report on the status of the Draft Housing Element should have been posted
9 in a timely fashion on the meeting's agenda as required by § 54954.2(a)(1). The failure to do so
violated the agenda rules of the Brown Act.

10 First, the Court has reviewed the video of this meeting and has found nothing to suggest
11 that the Board's motive in requesting Director Crawford to give a status report reflected anything
12 other than a genuine interest in keeping the public current on this very important and highly
13 charged matter. Additionally, the court accepts the representation from County Counsel that the
14 decision to have Director Crawford give a status update of the Draft Housing Element
15 amendment without notice was a rare event, and which Brown Act violation will not be repeated.
16 It appears the Board of Supervisors was induced to schedule this informational segment in direct
17 response to numerous communications sent by opponents of the Draft Housing Element to some
of the board members during the weeks before this hearing.

18 Nevertheless, this court rejects the County's suggestion that the statute was not violated
19 because the Board's purpose in having Director Crawford appear was to provide an update about
20 the Draft Housing Element and that no vote or action on the Draft Housing Element took place.
(Oppo. p. 2) The Board's good-faith intentions do not excuse it from the clear mandate of the
21 statute, since the failure to place that item on the agenda hinders the statute's stated purpose to
22 keep the public informed and to provide public participation in all phases of the decision-making
23 process. (See § 54950.)

24 Also, Respondent's assertion that no "action" or "vote" on the Draft Housing Element
25 occurred, is irrelevant in determining if the statute was violated. (See *Page v. Mira Costa
Comm. College District* (2009) 180 Cal.App.4th 471, 502 ["[W]e are cognizant that Brown Act

1 open meeting requirements encompass not only actions taken, but also factfinding meetings and
2 deliberations leading up to those actions. [Citations.]”.)

3 The statutory language clearly requires that an item be placed on the agenda concerning
4 all business to be either “transacted” or “discussed” at the meeting. (§ 54954.2(a)(1).) Director
5 Crawford’s report, as well as the ensuing Q & A with Board members, qualify as a “discussion”
6 under the statute.

7 The court also rejects the County’s contention that these events fell into the exception
8 under § 54945.2(a)(2) – “[O]n their own initiative or in response to questions posed by the
9 public, a member of a legislative body or its staff may . . . make a brief report on his or her own
10 activities.” (*Emphasis added.*) (Oppo. p. 3)

11 Typical of these “own activities” are a member’s attendance at a ceremonial event, a
12 report on interaction with constituents, noting her appearance at a hearing or conference in
13 Sacramento, reference to a recent business trip, or a comment on a recent meeting with other
14 officials. The Director’s report did not fall into any of these categories.

15 Here, the report was prepared by the head of a distinct department within the County
16 government who worked independently of the Board of Supervisors in preparing the Draft
17 Housing Element for the Board’s review and ultimate approval. The update by Director
18 Crawford describing his and his staff’s actions cannot be construed to be a “brief report” by any
19 member of the Board or by the Board’s staff of their “own activities.”

20 Nor can this report be construed as being “brief.” The report consumed 10 minutes, with
21 about five additional minutes of Q & A with members of the Board.

22 Given the planned nature of Director Crawford’s report and its discussion of substantive
23 information that is of continuing interest to the community, the court concludes the Board of
24 Supervisors had a ministerial duty to post this report as an agenda item for this meeting as
25 required by § 54954.2, and its failure to do so violated the Brown Act.

The court concludes an order is warranted to emphasize to the County the importance of
abiding by the notice provisions. Accordingly, the court finds Petitioner is entitled to a writ of
mandate enjoining the Board of Supervisors from engaging in such action in the future.

1 Contrary to Respondent's contention, the court interprets §54960(a) as not requiring
2 Petitioner to show it has suffered prejudice because of this past violation in order to qualify for
3 mandamus relief. (Oppo. p. 5.)

4 Respondent's reliance on the decision in *San Lorenzo Valley Community Advocates for*
5 *Responsible Educ. v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356 is
6 misplaced.

7 First, Plaintiffs in that case sought to set aside a decision of the local agency to close two
8 elementary schools as being made in violation of the Brown Act, § 54960.1, which statute allows
9 courts to declare null and void actions taken in violation of the Brown Act. The appellate court
10 held in those instances, a violation of the Brown Act does not necessarily invalidate the agency's
11 action unless the party challenging the agency action shows prejudice. (*Id.* at pp. 1409-1410.)

12 In contrast, here Petitioner is not seeking to overturn a prior vote or decision taken
13 against it by the Board of Supervisors under § 54960.1 (a), but seeks a determination under the
14 express language of § 54960(a) that the Board of Supervisors's past conduct violated the agenda
15 rule under the Brown Act.

16 Also, the *San Lorenzo* decision was decided prior to the 2012 amendment to § 54960
17 which added the language Petitioner is relying on, i.e., "to determine the application of this
18 chapter to past actions of the legislative body, . . ." Reading a prejudice requirement into this
19 language would effectively nullify the remedial purpose of this provision and allow the County
20 to continue to make this same error under the mistaken belief it is in compliance with the Brown
21 Act.

22 In any event, the evidence establishes Petitioner was prejudiced because the record shows
23 that his letter to the Board of Supervisors was discussed and Petitioner would have sent a
24 representative to the meeting had it been notified that this issues was going to be part of the
25 agenda.

3.
Declaratory Relief

Section 54960(a) authorizes an action for declaratory relief “to determine the applicability of this chapter to past actions of the legislative body.”

To be awarded declaratory relief a party must allege an “actual controversy relating to the legal rights and duties of the respective parties” (Code Civ. Proc. § 1060), i.e., “one which admits of definitive and conclusive relief by judgment within the field of judicial administration, as distinguished from an advisory opinion upon a particular or hypothetical state of facts.” (*BKHN, Inc. v. Dept. of Health Services* (1992) 3 Cal.App.4th 301, 308.)

Here the evidence establishes that the parties disagree over whether the Board’s past action violated the Brown Act, with Respondent continuing to insist that the Brown Act allowed the Board to schedule an interim status report for informational purposes without placing the matter on the agenda.

In light of County Counsel’s refusal to admit a violation occurred the court is justified in presuming Respondent will continue similar practices. (See *California Alliance for Utility, supra*, 56 Cal.App.4th at p. 1030, quoting *Common Cause v. Stirling* (1983) 147 Cal.App. 3d 518, 524.)

On this record the court finds that Petitioner has demonstrated that an “actual controversy” exists over the Board of Supervisors’ “past compliance with the Brown Act.” (See *California Alliance for Utility etc. Education v. City of San Diego* (1997) 56 Cal.App.4th 2014, 1029-1030 [an actual controversy was found to exist where the parties disagreed over whether the city council’s past action violated the city charter and the Brown Act]; also *Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, 886.)

Of particular relevance is the language in *California Alliance for Utility, supra*, finding Petitioner’s claim of a past statutory violation was ripe for a judicial declaration:

Contrary to City’s argument, the ripeness doctrine does not require that to obtain declaratory relief CAUSE allege and prove a pattern or practice of past violations. Rather, it is sufficient to allege there is a controversy over whether a past violation of law has occurred. . . . “An action for declaratory relief lies when the parties are in fundamental disagreement over the construction of particular legislation, or they dispute

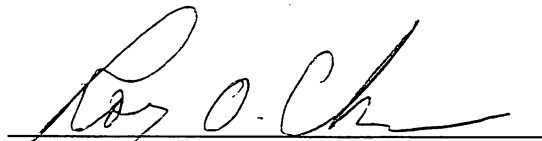
1 *whether a public entity has engaged in conduct or established policies in violation of*
2 *applicable law. [Citations.]”*

3 (*Id.*, 56 Cal.App.4th at p. 1029, *internal citations omitted.*)

4 On this basis, Petitioner is entitled to a judicial declaration finding that Respondent’s
5 decision not to post Director Crawford’s report on the Draft Housing Element or the Board’s
6 discussion of that matter as an agenda item for this meeting, violated § 54954.2(a)(1) of the
7 Brown Act.

8 SO ORDRED.

9 Dated: January 4, 2016



10 HON. ROY O. CHERNUS
11 Judge of the Superior Court
12 County of Marin

MARIN COUNTY SUPERIOR COURT

3501 Civic Center Drive
P.O. Box 4988
San Rafael, CA 94913-4988

<p>COMMUNITY VENTURES PARTNERS, INC.</p> <p>vs.</p> <p>COUNTY OF MARIN</p>	<p>CASE NO. CV1404718</p> <p>PROOF OF SERVICE BY FIRST CLASS MAIL</p> <p><i>Code of Civil Procedure Sections 1013a and 2015.5</i></p>
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I am an employee of the Marin County Superior Court. I am over the age of 18 years and not a party to this action. My business address is 3501 Civic Center Drive, Hall of Justice, San Rafael, California.

On January 4, 2016, I served the following document(s): **WRIT OF MANDATE AND ORDER GRANTING DECLARATORY RELIEF** in said action to all interested parties, by placing the envelope for collection and mailing on the date shown thereon, so as to cause it to be mailed on that date following standard court practices. I am readily familiar with the court's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid.

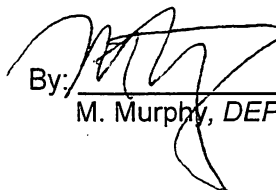
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed at San Rafael, California

JAMES M. KIM
Court Executive Officer

By: 
M. Murphy, DEPUTY